

**BEFORE THE KANSAS WORKERS COMPENSATION BOARD**

**RICKY G. LOVE**

## Claimant

**V.**

**SUPERIOR ESSEX, INC.**

Respondent

and

**SENTRY INSURANCE A MUTUAL COMPANY**

Insurance Carrier

Docket No. 1,068,277

## ORDER

Respondent requests review of the October 23, 2014, Award and the November 3, 2014, Award Nunc Pro Tunc by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on February 17, 2015.

## APPEARANCES

Mitchell W. Rice, of Hutchinson, Kansas appeared for claimant. Brandon A. Lawson, of Kansas City, Missouri appeared for respondent and its insurance carrier (respondent).

## RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

## ISSUES

The ALJ found claimant sustained personal injury by accident arising out of and in the course of his employment on October 7, 2013. Permanent partial disability (PPD) benefits were awarded based on a 12 percent permanent functional impairment to the right leg.

Respondent argues the ALJ erred in finding claimant sustained personal injury by accident arising out of and in the course of his employment, including specifically that claimant did not prove his alleged accident was the prevailing factor causing the injury, medical condition and resulting disability or impairment. Respondent also contends

claimant sustained no permanent functional impairment caused by the alleged accidental injury.

Claimant maintains the opinions of Dr. Murati regarding prevailing factor and permanent impairment are uncontroverted and should therefore be adopted by the Board.<sup>1</sup> Claimant requests the Board affirm the award.

The issues for Board review are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment?
2. If so, what is the nature and extent of claimant's disability?

#### **FINDINGS OF FACT**

Claimant testified he sustained personal injury to his right knee while working for respondent on October 7, 2013. Claimant's job was an insulation operator. On the date of accident, he was attempting to lift and dump a 55-gallon barrel of scrap into a large box. Claimant found the barrel was too heavy to lift, so he asked a coworker, Steve Allen, to assist him. Mr. Allen and claimant then lifted the barrel and dumped the scrap into the box. Almost immediately, claimant felt a sharp pain in his right knee. Claimant did not tell Mr. Allen about his pain. Prior to his work injury, claimant had no problems with his right knee.

Claimant testified he notified his supervisor about his accidental injury within a few minutes after the incident. Claimant told his supervisor he did not think it was anything major, but thought he should report it. Claimant worked the rest of the day performing a lot of walking. Claimant testified his knee was sore.

According to claimant, when he got out of bed the next morning he almost fell because he could not put weight on his knee. Claimant testified he went to work and told his supervisor he was in pain. Claimant arrived at 6:00 a.m., and when the human resources office (HR) opened at 8:00 a.m., he and his supervisor filled out an incident report.

Claimant testified he told HR he could barely walk and it was not possible for him to do his job because he walked an average of five miles each work day. According to claimant, HR told him if he did not work he would receive an attendance point, to which claimant responded he would rather get a point than to keep walking on his injured knee.

---

<sup>1</sup> In lieu of a brief to the Board, claimant relied on his submission letter to the ALJ.

Claimant testified HR scheduled an appointment for him with the Clara Barton Clinic. An MRI scan was ordered and physical therapy and injections were prescribed. Claimant testified he was told the MRI showed a bone contusion. Clara Barton Clinic released claimant to full duty on November 4, 2013.

Claimant testified respondent scheduled an appointment for him to see a specialist in Wichita, but respondent cancelled the appointment. Claimant asserted he told respondent there was still something wrong with his knee. On December 4, 2013, claimant turned at home to close a door, when his right knee gave out and he fell down. Claimant testified he told respondent he had fallen and still needed to see a specialist. No appointment was scheduled and respondent notified claimant his claim was denied.

Claimant sought medical treatment on his own with Randall K. Hildebrand, M.D., an orthopedic surgeon. Dr. Hildebrand testified he first saw claimant on December 9, 2013. Claimant told Dr. Hildebrand about the injury on October 7, 2013. Claimant also described an episode that occurred around December 2, 2013, when he knelt down at work and experienced pain in his right knee. Claimant also told Dr. Hildebrand about the December 4, 2013, incident at his home when he pulled a door towards himself, causing his knee to flex and twist, resulting in severe knee pain.

Claimant testified Dr. Hildebrand ordered x-rays and a cortisone injection, following which claimant experienced some improvement. Dr. Hildebrand performed surgery on December 18, 2013. Claimant returned to work on January 3, 2014.

Dr. Hildebrand testified he originally thought claimant's primary problem was exacerbation of preexisting right knee arthritis. Claimant's MRI of October 15, 2013, showed degenerative changes in the front of his knee beneath the patella, which could have caused claimant's symptoms. When Dr. Hildebrand performed surgery he found a right meniscus tear that was not visible on the MRI scan. Dr. Hildebrand testified he repaired the meniscus and continued to treat claimant postoperatively.

Dr. Hildebrand testified the meniscal tear could have been caused by the work injury in October 2013, or it could have been caused by the incident at work in early December 2013. The tear could also have resulted from the incident when claimant pulled the door towards him at home and felt acute pain. There could have been a small or partial tear that occurred at work and completed tearing in the last episode at home. Dr. Hildebrand testified it is not uncommon for a meniscus tear to not be visible on an MRI. Dr. Hildebrand testified he could not say the work accident was the prevailing factor in claimant's meniscus tear and need for treatment.

Claimant quit working for respondent on May 1, 2014, when he found a job with Verizon Wireless. According to claimant, his job at Verizon involves a completely different work environment: the floor is carpeted, he can wear comfortable athletic shoes and he works 8 hour shifts versus 12 hour shifts, walking on concrete, with respondent.

Claimant testified his knee is not normal, but is better than it was. This knee is still sore after sitting or walking for lengthy periods.

Claimant saw Pedro A. Murati, M.D., on February 13, 2014, for a medical evaluation at his counsel's request. Dr. Murati found claimant had severe crepitus in the right knee with a 7 degree flexion contracture, mild atrophy of the left thigh and status post-right knee arthroscopy. Claimant's diagnosis was, within reasonable medical probability, a direct result of the October 7, 2013, accident.<sup>2</sup>

Dr. Murati testified claimant clearly had an accident at work which "could produce what happened to him."<sup>3</sup> Claimant had degenerative joint disease prior to the injury, but it was completely asymptomatic before the incident and there was no history claimant had any previous right knee symptoms. According to Dr. Murati, a majority of people claimant's age have degenerative joints with no pain complaints, so to say he had a preexisting condition affecting his activities of daily living is not supported by the documentation provided to Dr. Murati.

Dr. Murati testified claimant's MRI showed a bone contusion, which is a clear change in the anatomical structure of the knee and was caused by trauma.

Dr. Murati rated claimant at 10 percent to the lower extremity, based on the flexion contracture, and 2 percent due to the knee surgery, for a total of 12 percent permanent functional impairment to the right leg.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2013 Supp. 44-501b provides in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508 provides in relevant part:

---

<sup>2</sup> Murati Depo. at 7.

<sup>3</sup> *Id.* at 8.

(f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

(g) 'Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) 'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

The Board incorporates by reference and adopts the findings and conclusions in the Award and Award Nunc Pro Tunc as though expressly set forth in this Order. Nothing would be served by repeating those finding and conclusions, which the Board finds are amply supported by the preponderance of the credible evidence. Judge Moore's decision is affirmed in all respects.

**CONCLUSIONS**

1. Claimant sustained personal injury by accident arising out of and in the course of his employment on October 7, 2013. The claimant's accident was the prevailing factor causing his injury, medical condition and functional impairment.
2. Claimant sustained a 12 percent permanent impairment of function to the right leg as a result of his accidental injury and is entitled to receive PPD benefits based on that finding.

**AWARD**

**WHEREFORE**, the Board finds that the October 23, 2014, Award and the November 3, 2014, Award Nunc Pro Tunc by Administrative Law Judge Bruce E. Moore, are affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2015.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant  
mwr@mannlaw.kscoxmail.com  
clb@mannlaw.kscoxmail.com

Brandon A. Lawson, Attorney for Respondent and its Insurance Carrier  
blawson@evans-dixon.com

Honorable Bruce E. Moore, Administrative Law Judge